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EXAMINER

DEMILLE, DANTON D

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KENNETH H. MOLLENAUER, DARREN R. SHERMAN,
STEVEN R. BYSTROM and CAMERON MINER

Appeal No. 2007-3310
Application No. 09/724,325
Technology Center 3700

Decided: March 19, 2008

Before WILLIAM F. PATE, III, MURRIEL E. CRAWFORD and JOSEPH A.
FISCHETTI, *Administrative Patent Judges*.

PATE, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

This is an appeal from the final rejection of claims 1-30. These are the only claims in the application. We have jurisdiction under 35 U.S.C. §§ 134 and 6.

The claimed invention is directed to a chest compression device for the administration of chest compressions to a patient undergoing CPR. The chest

compressions are administered by a belt around the chest of the patient. According to Appellants, Appellants have recognized a previously unknown problem of “sawing”, wherein the pectoral muscles of the patient will be cut due to the friction of the belt around the chest. Appellants solve this problem by providing a friction liner disposed substantially completely around the chest of the patient underneath the compression belt.

Claim 1, reproduced below, is further illustrative of the claimed subject matter.

1. A chest compression device comprising:

a belt which is adapted to extend at least partially around the chest of a human;

a rotating member operatively connected to the belt to constrict the belt about the chest; and

a friction liner adapted to be disposed between the belt and the chest of the human when the belt is extended around the chest of the human, said friction liner being adapted to extend substantially completely around the chest of the human, said friction liner permitting the belt to slide freely over said friction liner.

The reference of record relied upon by the Examiner as evidence of lack of novelty is:

Lach

4,770,164

Sep. 13, 1988

Claims 1-30 stand rejected under 35 U.S.C. § 102(b) as anticipated by Lach.

ISSUE

The Examiner argues that the shirt worn by the patient depicted in Figures 1 and 6 of Lach would broadly function as frictional liner because it is disposed between the belt and the chest of the human. The Examiner further contends that since the friction liner can take the form of a vest, corset, girdle, or belt there is

little difference between the claimed friction liner and the shirt depicted in the figures of Lach.

Additionally, the Examiner contends that since Lach teaches the provision of a thin plastic sheet between the human, the base, and the belt, the EMT when applying the device to a smaller person or child would substantially cover the chest of the child patient with the thin plastic sheet because of the size of the sheet used when covering an adult.

The Appellants have responded to these arguments with a set of declaration filed pursuant to 37 C.F.R. § 1.132 furnished with the Reply Brief. Two declarations provide evidence of the respective sizes of children and adult patients. A third declaration by David R. Kamlan addresses the Examiner's arguments.

Accordingly, the sole issue for our consideration is whether Appellants have established that the Examiner erred in rejecting the appealed claims under § 102.

PRINCIPLES OF LAW

The prior art may anticipate a claimed invention, and thereby render it non-novel, either expressly or inherently. *In re Cruciferous Sprout Litig.*, 301 F.3d 1343, 1349 (Fed. Cir. 2002). Express anticipation occurs when the prior art expressly discloses each limitation (i.e., each element) of a claim. *Id.* In addition, “[i]t is well settled that a prior art reference may anticipate when the claim limitations not expressly found in that reference are nonetheless inherent in it.” *Id.*

“The [Patent] statute stresses that a dependent claim must add a limitation to those recited in the independent claim. See 35 U.S.C. § 112, ¶ 4 (2000) (“[A] claim in dependent form shall contain a reference to a claim previously set forth and then specify a further limitation of the subject matter claimed.”) (emphasis added). See *Curtiss-Wright Flow Control Corp.*, 438 F.3d 1374, 1380 (Fed. Cir. 2006).

ANALYSIS

In our view the Examiner has not established the lack of novelty of the claimed subject matter on appeal by a preponderance of the evidence. Therefore, the rejection of claims 1-30 based on the ground of lack of novelty is reversed. Our reasons follow.

This case, in the end, comes down to a consideration of the evidence for and against anticipation. On the one hand, we have the Examiner's conjecture and speculation, perhaps well founded. On the other hand, however, we have the express declaration of David R. Kamlan who we credit as an expert in the art of cardiopulmonary resuscitation. Thus the Examiner's contention that the shirt of Lach would function as a friction liner, at least to a certain extent, is rebutted by the express testimony of Kamlan. Kamlan states that the shirt used in a device of belt-driven chest compressions is a source of friction leading to reduced battery life, laceration, and bruising on the patient. Accordingly, the Examiner's finding that the shirt functions as a friction layer, at least to some extent, is expressly rebutted.

The Examiner's argument that since the friction liner of Appellants' claims can take the form of a vest, corset or girdle, as well as a belt, there is little difference between this structure and the shirt shown in Lach is also rebutted by the averment of Kamlan. Thus, it is seen that the form of the liner may be variable, but the material of the liner must be one to allow slippage to occur so that patient injury does not result.

Moreover the Examiner's contention that Lach, in teaching that a friction liner used on the contoured portions 20 and 22 would, when used with some patients, particularly patients of small girth, result in a friction liner that covered the chest of the small patient, is also rebutted by the Kamlan declaration. Kamlan discusses in paragraph 5 that EMT's are trained to provide appropriate care to a patient including providing care appropriate to the patient's size during CPR. Kamlan states that belt-driven chest compression devices for use with children and infants must be sized differently than similar devices used for average adult-sized patients. Kamlan states that the commercial device of Appellants' assignee is not FDA approved for use with children, because it is not appropriately sized. Thus, the Examiner's argument based on using the device of Lach with undersized patients cannot be credited.

Based on the foregoing, it is our finding of fact that the subject matter of claims 1-30 does not lack novelty over the disclosure of the Lach patent.

NEW GROUND OF REJECTION

Claim 12 is rejected under 35 U.S.C. § 112, fourth paragraph, as failing to further limit the subject matter of the claim from which it depends. Claim 10 specifies that the friction liner is in the form of a second belt. Claim 12 states that the friction liner is selected from a group comprising a belt, a vest, a corset, a girdle, a strap and a band. Thus, it can be seen that claim 12, ostensibly dependent on claim 10, enlarges the scope of claim 10. Accordingly, claim 12 is not a proper dependent claim.

This decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b) (2006). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of the appeal as to the rejected claims:

- (1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner
- (2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2006).

CONCLUSION

The rejection of claim 1-30 on the ground of lack of novelty is reversed.

A new rejection of claim 12 under 35 U.S.C. § 112, fourth paragraph, has been entered by the Board.

REVERSED; § 41.50(b)

JRG

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